STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

KENDALL JAMES KITCHEN,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 11, 2000

No. 219083
Ogemaw Circuit Court
LC No. 98-001317-FH

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of indecent exposure, MCL 750.335a; MSA 28.567(1), based on allegations that he exposed himself to two children in a store parking lot. In addition to the indecent exposure charge, the prosecution also charged defendant as a sexual delinquent pursuant to the alternate sentencing provisions of MCL 767.61a; MSA 28.1001(1). The trial court dismissed the sexual delinquent notice, and the prosecution appeals. Defendant cross-appeals as of right from the indecent exposure conviction. We affirm defendant's conviction and remand for further proceedings on the sexual delinquency charge.

I

We agree with the prosecutor that the trial court erroneously dismissed the prosecution's sexually delinquent person charge. Resolution of this issue involves a question of law. This Court reviews questions of law de novo. *People v Williams*, 226 Mich App 568, 580; 576 NW2d 390 (1997).

MCL 767.61a; MSA 28.1001(1) provides:

> In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people

> may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in section 35 of chapter 8 of this act, and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense.

A sexually delinquent person is defined in MCL 750.10a; MSA 28.200(1) as:

> [A]ny person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.

Sexual delinquency is a matter for sentencing, and is unrelated to the proof necessary for a conviction on the principal charge. *People v Helzer*, 404 Mich 410, 417; 273 NW2d 44 (1978). Sexual delinquency is a separate, alternative form of sentencing, rather than a penalty enhancement. *Id*. at 419. MCL 767.61a; MSA 28.1001(1), by implication, requires a separate hearing on the record. *Id*. at 419 and n 13. In cases where the defendant does not waive his right to a jury trial, the trial court must hold a trial before a separate jury on the issue of sexual delinquency. *Id*. at 422. "The second jury should be empaneled before the same trial judge immediately after conviction on the principle charge." *Id*. at 424. The charge against the defendant must be brought before the trial on the principal offense, but amendments to the indictment or information are permitted. *Id*. at 424, 426.

The trial court in this case found that the requirements of *Helzer*, *supra*, and MCL 767.61a; MSA 28.1001(1), were not satisfied. Specifically, the court noted that the second jury was not empaneled by the same trial judge and that the second jury was not empaneled immediately after defendant's indecent exposure conviction. However, under the circumstances of this case, neither of these occurrences warranted dismissal of the sexual delinquent notice.

Judge Michael J. Matuzak presided over the jury trial in this case. On or around October 8, 1998, after the indecent exposure trial, defendant accepted the prosecution's offer to plead guilty to a charge of "attempted sexually delinquent person." Defendant subsequently filed a motion to withdraw his plea of guilty to the charge, arguing that no such crime existed. The trial court granted the motion in an order filed November 19, 1998. The parties do not dispute that "attempted sexually delinquent person" is not a valid offense.

The confusion caused by defendant's guilty plea to the non-existent charge was cleared up on November 12, 1998, shortly after Judge Matuzak lost his bid for re-election. On December 10, 1998, the court notified the parties of a pretrial hearing on the sexual delinquency matter that was to be held on January 14, 1999 (later changed to January 15), before Judge Matuzak's successor, Judge Baumgartner. The jury trial was set for January 25, 1999.

The *Helzer* opinion does not provide any guidance to help courts determine if the second jury has been empaneled "immediately" after a conviction on the principal charge. In *Helzer*, *supra*, our Supreme Court's holding that a separate trial was necessary before a defendant could be sentenced as a sexual delinquent was based on its concern regarding "[t]he substantial function and discretion of the jury in hearing the sexual delinquency charge, the high potential for automatic conviction were the original jury to hear the delinquency charge[,] and the penalty of life imprisonment possible upon finding sexual delinquency." *Helzer*, *supra* at 423. Neither does *Helzer* provide any explanation for its recommendation that the "second jury *should* be empaneled before the same trial judge immediately after conviction on the principal charge." *Id*. at 424 (emphasis added). Whether the same trial judge must empanel both juries was not an issue in the case, nor was the amount of time involved. This fact, coupled with the Court's use of the term "should," bars the conclusion that the *Helzer* Court *mandated* that the same trial judge preside over both proceedings, and that the second jury be empaneled "immediately" after the conviction on the principal charge.

The "same trial judge" and "immediately" language in *Helzer* are not absolutely mandated by the case. The Court's use of the word "should" suggests that these are merely procedural guidelines for courts to follow. Here, the lower court record reveals that both parties contributed to the delay in empaneling the second jury. The parties do not dispute that two days after defendant's conviction on the principal offense, Judge Matuzak set the sexual delinquency jury trial for September 14, 1998, and that the subsequent delay was caused by the parties' stipulation to adjourn this trial and defendant's plea to a non-existent offense.

Approximately five months passed between defendant's indecent exposure conviction on August 24, 1998, and the scheduled date of the second jury trial, January 25, 1999. Although this delay does not comport with *Helzer*'s guideline that the second trial occur "immediately" after defendant's conviction on the principal charge, the fault lies with the parties, not the trial court. Judge Matuzak attempted to hold the second trial soon after the first, on September 14, 1998. The parties stipulated to adjourn this trial because defense counsel was unavailable. Subsequently, whether by mistake or otherwise, the prosecution requested that defendant plead guilty to the non-existent charge of "attempted sexually delinquent person", and defendant obliged. Once the plea was finally withdrawn on November 12, 1998, the court moved forward with the proceedings. Defense counsel was therefore partly responsible for the delay in empaneling the second jury. We conclude that the trial court should have found that the *Helzer* guideline of immediacy, which was presumably intended to favor defendants, was not violated. The trial court erred in dismissing the sexual delinquency charge against defendant.

The prosecution also argues, correctly, that the trial court erred in finding that it was required to offer expert testimony on the issue of defendant's delinquency. MCL 767.61a; MSA 28.1001(1), only

states that the prosecution "*may* produce expert testimony" (emphasis added). Accord, *People v Murphy*, 203 Mich App 738, 744; 513 NW2d 451 (1994).

We therefore reverse the dismissal of the sexual delinquency charge and remand for further proceedings.

II

On cross-appeal, defendant argues that the trial court erroneously denied his motion for directed verdict of acquittal. This Court reviews de novo a trial court's denial of a motion for directed verdict. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). In reviewing a trial court's denial of a directed verdict for defendant, we view the evidence in the light most favorable to the prosecutor to determine if a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). Defendant asserts that the testimony before the trial court established only that defendant was attending to private matters in his van, and did not knowingly expose himself. We find no error.

In *People v Vronko*, 228 Mich App 649; 579 NW2d 138 (1998), on substantially similar facts, this Court found the evidence sufficient to support the defendant's conviction of indecent exposure. The *Vronko* Court held that MCL 750.335a; MSA 28.567(1) contains "no requirement that the defendant's exposure actually be witnessed by another person in order to constitute 'open or indecent exposure,' as long as the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it." *Id*. at 657. The evidence in *Vronko* was sufficient where witnesses saw the defendant sitting in his car, with his legs bare, and his hand apparently holding something and moving in his crotch area. *Id*. at 655.

Here, one witness testified that she believed she saw defendant masturbating with no pants on. She also testified that defendant caught her attention by positioning his rear view mirror so that she could see his face. Another witness testified that he saw defendant moving his hand in the area of his crotch as if masturbating, and that one of defendant's hips was bare. A police officer testified that defendant admitted that he was parked in the store parking lot on the night of the incident, that he was fantasizing about women, and that he had been naked below the waist. Based on the foregoing, a rational trier of fact could find that the essential elements of the crime of indecent exposure were proven beyond a reasonable doubt. A rational trier of fact could have concluded that defendant was in fact masturbating in the store parking lot, and was therefore exposed. Moreover, a rational trier of fact could find that "the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it." *Vronko, supra* at 657. The trial court did not err in denying defendant's motion for directed verdict.

Defendant's conviction of indecent exposure is affirmed. We reverse the trial court's order dismissing the sexual delinquency charge and remand for trial on the matter and resentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck